

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID GERY CONN,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

CASE NO. C11-5223 RJB JRC

ORDER ADOPTING REPORT AND
RECOMMENDATION ON MOTION
FOR ATTORNEY'S FEES, COSTS,
AND EXPENSES

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge J. Richard Creatura regarding Plaintiff's Motion for EAJA Fees, Costs, and Expenses Pursuant to 28 U.S.C. § 2412 (Dkt. 32). Dkt. 36. The Court has reviewed the relevant documents and the remainder of the file herein.

The Report and Recommendation of U.S. Magistrate Judge J. Richard Creatura was filed on February 28, 2012, and without objection from the Commissioner, was adopted on March 26, 2012. Dkts. 29 and 30. The Commissioner's decision was reversed and the case was remanded to the Administration for further consideration. Dkt. 30.

1 On May 23, 2012, Plaintiff filed his motion, arguing that he is entitled to attorneys' fees
2 in the total amount of \$7,564.22, expenses in the amount of \$34.10, and for costs of \$27.20,
3 pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Dkt. 32. On June 4,
4 2012, the Commissioner filed a response opposing the motion, and argued that his position on
5 this case was substantially justified and so Plaintiff is not entitled to an award of fees, expenses,
6 or costs. Dkt. 33.

7 Plaintiff's Motion for EAJA Fees, Costs and Expenses Pursuant to 28 U.S.C. § 2412
8 (Dkt. 32) was referred to the Magistrate Judge for a Second Report and Recommendation. The
9 Report and Recommendation (Dkt. 36) was issued and the parties have filed their responsive
10 pleadings (Dkts. 37-39). The matter is now ripe for review.

11 The Report and Recommendation (Dkt. 36) should be adopted and the Plaintiff's Motion
12 for EAJA Fees, Costs and Expenses Pursuant to 28 U.S.C. § 2412 should be denied. As stated in
13 the Report and Recommendation, even though the ALJ's decision denying benefits was reversed
14 and the case remanded for further administrative proceedings, the ALJ's positions were
15 substantially justified and the government's defense of those positions was also substantially
16 justified for purposes of the EAJA. Plaintiff's objections are generally a repetition of his prior
17 arguments and are addressed in the Report and Recommendation. Plaintiff does argue that the
18 Report and Recommendation improperly uses *post-hoc* arguments in its EAJA analysis, contrary
19 to *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)(holding that judicial review of
20 administrative agency's decision is constrained by the grounds invoked by the agency). Dkts. 37
21 and 39. Plaintiff's argument fails to recognize that although the court is not permitted to use
22 *post-hoc* arguments in deciding whether the ALJ's decision is correct under the law, the court is
23 not so constrained when determining whether the ALJ's decision and the government's defense
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1 of that decision was substantially justified for purposes of the EAJA statute. Plaintiff's motion
2 should be denied.

3 Accordingly, it is hereby **ORDERED** that:

- 4 • The Report and Recommendation (Dkt. 36) is **ADOPTED**; and
5 • Plaintiff's Motion for EAJA Fees, Costs and Expenses Pursuant to 28 U.S.C. §
6 2412 (Dkt. 32) is **DENIED**.

7 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
8 to any party appearing *pro se* at said party's last known address.

9 Dated this 20th day of August, 2012.

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12 ROBERT J. BRYAN
13 United States District Judge
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